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**AMBANK (M) BHD**

**v.**

**TAN YU HOCK**

B

HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG JC
[SUIT NO: D-22NCC-1963-11/2011]
20 JULY 2012

C ***CONTRACT:*** *Construction of terms of contract - Housing loan - Interest - Terms in agreement that payment of instalment to commence after issuance of permanent CF - Whether purchaser liable to pay interest prior to issuance of CF - Whether financier represented that developer liable to pay interest during period before issuance of CF - Whether* D *financier estopped from claiming interest from purchaser*

***CONTRACT:*** *Damages - Sale and purchase of property - Delivery of vacant possession - Issuance of CF - Failure by developer to inform purchaser - Purchaser subjected to interest - Whether developer obligated to inform purchaser of issuance of CF - Late delivery of vacant possession* E *- Whether purchaser could sue developer for damages*

The defendant purchaser entered into a tripartite sale and purchase agreement ('SPA') with Spring Crest (M) Sdn Bhd as the vendor/developer and Dacing Emas Sdn Bhd as the owner to F purchase a semi-detached factory. The plaintiff, formerly known as AmFinance Berhad, was the successor-in-title to MBf Finance Bhd. The defendant entered into the SPA based on the promotion of MBf Property Services Sdn Bhd ('MBf Property') that if the defendant were to take a loan from MBf Finance Bhd, G MBf Property would pay all the interest accrued on the loan disbursed for him to pay for the purchase price of the factory during the period of construction until the loan was fully drawndown with the CF being issued. Prior to the letter of promotion, there was a letter of offer for a loan from MBf Finance H Bhd to the defendant with a clause that the developer had agreed to bear all interest payments until the issuance of the CF for occupation. In 1998 the defendant together with other purchasers brought an action at the Shah Alam High Court against MBf Finance Bhd and MBf Property and obtained the orders, *inter alia*,

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that the plaintiffs would not be required to make any payments in relation to the loan from the first defendant for so long as the buildings purchased have not had a CF of occupation and that the first defendant be restrained from making a claim to recover the loan. Upon issuance of the CF, the plaintiff filed the suit against the defendant to claim for the amount outstanding in the sum of RM2,667,264.98. At the summary judgment application, a consent judgment for the sum of RM524,623.14 was entered whilst the balance would be determined upon trial. The issues formulated for the court's disposal by way of O. 14A of the Rules of the High Court 1980 ('RHC') were: (i) whether the plaintiff can impose and claim interest on the said loan from the date the loan was disbursed till the date of the order of the Shah Alam High Court; (ii) whether the plaintiff could impose and claim interest from 8 July 1999 till 10 December 2010 *ie*, the date the CF was issued; (iii) whether the plaintiff could impose and charge interest from 11 December till date of settlement; and (iv) whether the plaintiff was under a duty, contractual or otherwise, to inform the defendant of the issuance of the CF to the premises.

**Held (allowing interest on consent judgment sum):**

**(1)** The contractual links in the relationship between the borrower, the developer and the financier was that the financier could only require the borrower to commence the instalment payments only after a permanent CF was obtained. The plaintiff gave assurance to the defendant as the purchaser that the plaintiff would be looking to the developer to pay the interest during the period prior to the issuance of the CF. Hence the plaintiff was not entitled to claim interest from the defendant for the loan disbursed for the period before the CF was issued. *MBf Property Services Sdn Bhd & Anor v. Balasubramaniam K Arumugam* (foll). (paras 16 & 17)

**(2)** The plaintiff, having represented that it would look to the developer to pay, was estopped from claiming the interest not paid by the developer from the defendant. Both the demands of equity and good conscience would operate to prevent the plaintiff from doing so. (para 24)

**(3)** The words of the order of the Shah Alam High Court were clear and unambiguous. There was nothing stated in the order that the rights of the plaintiff to claim interest for the period

A before the CF was issued was only held in abeyance and postponed to a later date *ie*, after the CF was issued. In light of this, the plaintiff could not impose and claim interest on the loan from the date the loan was disbursed until the date of the Shah Alam High Court order and also from 8 July 1999 B till 10 December 2010. (paras 28-31)

**(4)** Once the CF had been issued and there was agreement that it was issued on 10 December 2010, the obligations of the defendant as borrower under the loan agreement would apply C with full force. The obligation would include payment of the loan and the interest on the full loan disbursed. However it did not include the interest on the loan disbursed for the period before issuance of CF. (para 32)

D **(5)** Pursuant to cls. 16, 17 and 18 of the SPA, it was the developer who had to inform the defendant about the issuance of the CF following the delivery of vacant possession to the property. However, in the instant case, there was no evidence that the developer had informed either the purchaser or the financier (as absolute assignee) of the issuance of the E CF. (paras 33 & 36)

**(6)** The defendant as the purchaser had the right to sue the developer for damages for late delivery of possession or for losses suffered as a result of having to pay interest without F realising that CF had been issued. (para 37)

*[Interest at 3.4% above BLR (which is at 6.60%) per annum on a monthly rest plus 1% per annum for default interest on RM524,623.14 from 1 September 2011 till date of realisation.]*

G **Case(s) referred to:**

*AmBank (M) Bhd v. Goh Hock Eng & Anor [2009] 1 LNS 1331 HC* ***(not foll)***

*Cheong Bee Yong v. MBf Finance Bhd & Anor [2001] 1 CLJ 668 HC* ***(refd)***

H *Citibank Bhd v. Pembangunan Cahaya Tulin Sdn Bhd (receivers and managers appointed) & Ors and other suits [2012] 9 MLJ 181* ***(refd)***

*Hipparion (M) Sdn Bhd v. Chung Khiaw Bank Ltd [1989] 2 CLJ 101; [1989] 1 CLJ (Rep) 41 SC* ***(refd)***

*Loh Hoon Loi & Ors v. Viewpoint Properties (Sabah) Sdn Bhd [1995] 1 LNS 286 HC* ***(refd)***

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*Malaysian Newsprint Industries Sdn Bhd v. Perdana Cigna Insurance Bhd & Ors [2008] 1 CLJ 246 CA* ***(refd)***
*Max-Benefit Sdn Bhd v. Phuah Thean An & Anor [2001] 2 CLJ 70 HC* ***(refd)***
*MBf Property Services Sdn Bhd & Anor v. Balasubramaniam K Arumugam [2000] 2 CLJ 230 CA* ***(foll)***
*Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd [1985] 1 CLJ 56; [1985] CLJ (Rep) 231 FC* ***(refd)***
*Pak Ki Yau & Anor v. Kumpulan Promista Sdn Bhd [1999] 4 CLJ 205 HC* ***(refd)***
*Phileoallied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor [2002] 2 CLJ 621 FC* ***(refd)***
*Sakinas Sdn Bhd v. Siew Yik Hau & Anor [2002] 3 CLJ 275 HC* ***(refd)***
*Tan Yang Long & Anor v. Newacres Sdn Bhd [1992] 1 CLJ 211; [1992] 3 CLJ (Rep) 666 HC* ***(refd)***

**Legislation referred to:**
Civil Law Act 1956, s. 4(3)
Evidence Act 1950, s. 115
Rules of the High Court 1980, O. 14A

*For the plaintiff - Hafizatulazna Mohd Unit; M/s Azhar & Wong*
*For the defendant - Sujatha Selliah @ Celliah; M/s Seah Balan Ravi & Co*

*Reported by S Barathi*

## JUDGMENT

**Lee Swee Seng JC:**

**Prologue**

**[1]** There is always the risk of a building not being completed on time for a purchaser who enters into a sale and purchase agreement with a developer. The current debate in this area is how best to usher in a system where a developer would "build first and sell later" rather than "build and sell". The former would reduce the incidents of purchasers not being able to take practical completion of the building on time. It would also reduce the number of abandoned housing or industrial building projects.

**[2]** In this case, the sale and purchase agreement was signed on 22 December 1994. The certificate of fitness ("CF") was not issued until 10 December 2010! As the purchaser had taken a loan from a bank, one can well imagine the interest that the

purchaser has to pay without being able to move in and occupy and enjoy the building and the uncertainty as to whether the building would ever be completed at all!

**The Parties**

**[3]** The defendant here is a purchaser who had signed a tripartite sale and purchase agreement dated 22 December 1994 with Spring Crest (M) Sdn Bhd as the vendor/developer and Dacing Emas Sdn Bhd as the owner. It was for the purchase of a 11/2 storey semi-detached factory to be built on a piece of land designated as Lot 226 in what is to be called Taman Perindustrian Puchong Seksyen 5, for a purchase price of RM855,165.

**[4]** The defendant said he entered into the sale and purchase agreement based on the promotion of MBf Property Services Sdn Bhd in that if the defendant were to take a loan from MBf Finance Bhd then MBf Property Services Sdn Bhd would pay all the interest accrued on the loan disbursed to him to pay for the purchase price of the factory during the period of construction until the loan is fully drawndown with the CF being issued. The said letter dated 22 December 1994 from MBf Property Services Sdn Bhd to the defendant is at p. 6 of the common bundle of documents ('CBD') filed for the purpose of O. 14A of the RHC application. The letter was signed off by MBf Property Services Sdn Bhd as the attorney for Spring Crest (M) Sdn Bhd and Dacing Emas Sdn Bhd. Indeed the sale and purchase agreement had been signed by MBf Property Services Sdn Bhd as attorney for both the vendor/developer and the owner.

**[5]** The plaintiff herein was formerly known as AmFinance Berhad and is the successor-in-title to MBf Finance Bhd.

**Problem**

**[6]** Even prior to the said letter from MBf Property Services Sdn Bhd, there was already a letter of offer dated 10 December 1994 for a loan of RM760,000 from MBf Finance Bhd to the defendant containing the usual terms and conditions and a rather unique term in cl. 18(b) and (c) at p. 5 of the said letter of offer that reads:

> *No Interest Factory Purchase Plan: (b) The developer, M/s Spring Crest (M) Sdn Bhd has agreed to bear all interest payment until the issuance of Certificate of Fitness for Occupation.* However, obligations and commitments as per loan agreement to be executed between you and our attorney shall remain unchanged. (c) Monthly Debit Notice Statements for interest payments to be due will be billed to you. However, official receipts for payments made by the developer will not be issued to you. (emphasis added)

**[7]** The letter at p. 6 of the CBD from MBf Property Services Sdn Bhd to the defendant went to state as follows:

> The payment of the interest will be made by us directly to your end financier with whom we shall be making arrangement to pay with your consent. Your end financier will keep you informed of the payment.

**[8]** The defendant herein had in 1998 together with other purchasers as the plaintiffs brought an action in the Shah Alam High Court in MT3-24-1802-1998 against MBf Finance Bhd as the 1st defendant and MBf Property Services Sdn Bhd as the 2nd defendant. The orders granted by the Shah Alam High Court on 7 July 1999 by His Lordship Low Hop Bing J (later JCA) were as follows:

1. that the plaintiffs shall not be required to make any payments in relation to the loan from the 1st defendant for so long as the buildings purchased have not had a certificate of fitness of occupation issued;

2. That the 1st defendant whether by itself, its agents or servants or howsoever, be restrained from making a claim or bringing any action against any or all of the plaintiffs to recover the loan including enforcing any of its rights under the loan agreements against any or all of the plaintiffs for the purchase of the factory units in the designated titles until the certificate of fitness of occupation is obtained. See pp. 123-124 of the CBD.

**[9]** After the CF was issued on 10 December 2010, the plaintiff herein had on 23 November 2011 filed this suit against the defendant to claim for the amount outstanding in the loan made up as follows:

A 1. The sum of RM2,667,264.98 as at 31 August 2011;

2. Interest on the sum of RM2,667,264.98 at the rate of 3.4% per annum above Base Lending Rate of the plaintiff (currently 6.60% per annum) on a monthly rest with default interest at 1% per annum on the arrears outstanding calculated from 1 September 2011 to date of settlement and costs.

**[10]** During the summary judgment application both parties were able to arrive at a consent judgment being recorded for the sum of RM524,623.14 with the balanced claims to go for trial.

**[11]** I must commend the parties and their counsel for the graciousness they have extended to each other in agreeing to the court's suggestion that really the disputes on the balanced claims can be disposed of under O. 14A of the Rules of the High Court 1980 ("RHC").

## The Prayer

**[12]** Four questions were formulated for the court's disposal by way of O. 14A RHC. They are as follows:

1. Whether the plaintiff can impose and claim interest on the said loan from the date the loan was disbursed on 27 February 1995 till 7 July 1999 (the date of the order of the Shah Alam High Court);

2. Whether the plaintiff can impose and claim interest from 8 July 1999 till 10 December 2010, ie the date the Certificate of Fitness (CF) was issued;

3. Whether the plaintiff can impose and charge interest from 11 December 2010 till date of settlement;

4. Whether the plaintiff was under a duty, contractual or otherwise, to inform the defendant of the issuance of the CF to the premises.

## The Principle

*Whether The Plaintiff Can Contractually Claim Interest From The Defendant On The Loan For The Period Before The CF Is Issued*

**[13]** Learned counsel for the plaintiff contended that the terms as provided for in the loan agreement of 10 February 1995 are clear and that effect must be given to the terms as may be garnered from the Agreement entered into. I bear in mind the principle stated in the Court of Appeal case of *Malaysian Newsprint Industries Sdn Bhd v. Perdana Cigna Insurance Bhd & Ors* [2008] 1 CLJ 246 at p. 259 where it was stated as follows:

> [26] It is also quite established that when interpreting the meaning of the words used in a contract they should be construed in their grammatical and ordinary meaning, except to the extent that some modification is necessary in order to avoid absurdity, inconsistency or repugnancy (The Interpretation of Contracts by Kim Lewinson, Sweet & Maxwell 1989).

**[14]** The following clauses were highlighted by learned counsel for the plaintiff with respect to the defendant's obligation to pay interest on the loan:

> **Section 6.01 Payment Of Interest**
>
> The Borrower covenants and agrees that until commencement of the repayment of the Loan as provided in section 7.01 it shall without notice from the Lender pay interest to the Lender on the Loan at the Prescribed rate on each Interest Payment date.
>
> **Section 6.02 Calculation Of Interest**
>
> (a) The interest chargeable on any sum advanced or paid to or on behalf of or otherwise howsoever payable by the Borrower to the Lender under this agreement from the date on which the same shall have been advanced or paid to or on behalf of or the benefit of the Borrower shall be calculated on the daily balance of the Borrower's account at the end of every interest period.
>
> (b) The interest chargeable between the date on which the full amount of the Loan shall have first been advanced or paid (hereinafter referred to as "the full disbursement date") and the last day of the month of the full disbursement date or the month next following; whichever is applicable shall be calculated on the full amount of the loan and interest payable by the borrower as at the full disbursement date.

A (c) In and for the first 12 months period thereafter, interest shall be calculated on the total amount of the moneys due to the Lender hereunder (whether for principal or interest) as at the last day of the month of the Full Disbursement Date or the month next following; whichever is applicable. In and for each 12 months period thereafter, interest shall be calculated
B on the total amount of the moneys due to the Lender hereunder (whether for principal or interest) as at the last day of the preceding 12 month period (hereinafter referred to as the "Anniversary Balance Date")

C **[15]** It must be pointed out here that the dispute is not on the interest payable after the full disbursement of the loan but interest payable against the progressive releases of the loan based on the various Architect's certificate of progress payments pending the issuance of the CF.

D **[16]** However in the light of the representation made by the plaintiff to the defendant in the Letter of Offer dated 10 December 1994, the liability of the defendant to pay interest before the issuance of the CF must be read consistent with the representation made by the plaintiff to the defendant with respect
E to whom the plaintiff would be looking, for the payment of the said interest. Clause 18(b) at p. 5 of the said Letter of Offer is once again reproduced below and must be read in its proper context as forming part and parcel of the Loan Agreement that
F was subsequently signed on 10 February 1995:

> No Interest Factory Purchase Plan: (b) The developer, M/s Spring Crest (M) Sdn Bhd has agreed to bear all interest payment until the issuance of Certificate of Fitness for Occupation. However, obligations and commitments as per loan agreement to
G be executed between you and our attorney shall remain unchanged.

**[17]** Notice that it is not preceded with the words "Notwithstanding anything to the contrary in this Agreement or the Letter of Offer". Why should the plaintiff as lender be stating
H the above expressly in the letter of offer? It is to give effect to the arrangements that the developer has entered into with the defendant as purchaser. It is to give assurance to the defendant as purchaser that the plaintiff would be looking to the developer to pay the interest during the period prior to the issuance of the
I CF. It is for the plaintiff as lender to then tie up the necessary

arrangement with the developer. It is not for the defendant as purchaser/borrower to poke his nose into the exact legal arrangement that the plaintiff as lender has entered into with the developer. Indeed the plaintiff predecessor-in-title, MBf Finance Bhd is a company related to the developer's agent, MBf Property Services Sdn Bhd. They are members belonging to the same group of companies, the MBf Group. Little wonder that the same logo and service mark is used for both the financier and the developer's agent. The combined effect of both the representations by MBf Property Services Sdn Bhd and MBf Finance Bhd is to assure the purchaser that he need not have to worry of the interest accumulating until CF is issued because that is now taken care of by the developer and that the financier will look to the financier for payment and more so when they belong to the same group of companies. In other words, it is not a sales gimmick seeking to entice and entrap the unsuspecting but a substantial saving in terms of interest during the construction period grounded on nothing less than a double confirmation from both the developer and financier that the purchaser does not have to worry of the scheme not being implemented. This court must consider how the words in the brochure at p. 68 of CBD would play in the mind of a purchaser like the defendant. The brochure says it all. Nothing could be more tempting and tantalising. It reads:

> Say Yes to no interest. No interest Factory Purchase Plan. Pay only 10% and save RM133,707.00.

**[18]** It turned out subsequently that MBf Property Services Sdn Bhd had defaulted in payment of the interest to the developer. The plaintiff is now looking to the defendant to pay. Can the plaintiff contractually enforce against the purchaser/borrower such a payment of interest during the period before the CF is issued?

**[19]** Indeed the web of relationships between and among the various parties that have welded them together has been decisively dissected and deciphered by His Lordship Gopal Sri Ram JCA (later FCJ) in *MBf Property Services Sdn Bhd & Anor v. Balasubramaniam K Arumugam* [2000] 2 CLJ 230 at pp. 232-234 as follows:

> On July 23, 1993, the respondent entered into a sale and purchase agreement with a housing developer called Kesturi Sakti Sdn Bhd to purchase a property. It was an agreement in the statutory form prescribed by the Housing Developers (Control & Licensing) Regulations 1989.

A In order to finance the purchase of the property under the sale and purchase agreement, the respondent applied for and obtained a loan from the second appellant. In its letter of offer of a housing loan dated August 25, 1993 the second appellant inserted a provision which reads as follows:

B Clause 8

Repayment:

Interest on the loan shall be payable monthly until the issuance of Certificate of Fitness (CF). Upon the issuance of CF, repayment C of this loan will be by 132 equal monthly instalments of principal and interest of Malaysian Ringgit RM 2,628.76, the first instalment to be made on the first day each month following next after the date of issuance of Certificate of Fitness (CF). However MBf Berhad reserve the right to effect the commencement of the D monthly instalment of principal and interest at our absolute discretion from time to time.

This offer was accepted by the respondent on September 2, 1993. Contemporaneously with the signing of the sale and purchase agreement, the first appellant and the respondent entered into an E agreement which is evidenced in an undated letter of the first appellant. Shorn of its formal parts, this is what it says:

We refer to your purchase of the above unit.

We are pleased to inform you that in consideration of you F purchasing the said unit we agree to pay all the interest accrued on your loan disbursed to pay for the purchase price of the above unit during the period of construction of the unit and until your loan is fully drawndown with the Certificate Of Fitness being issued. The agreement to pay is not assignable by you and subject to you complying with the terms and conditions of your G Loan Agreement with your end financier.

The payment of the interest will be made by us directly to your end financier with whom we shall be making arrangement to pay with your consent. Your end financier will keep you informed of H the payment.

Please note that our agreement to pay interest is also subject to that the interest rate from your end financier for the loan must not be more than the prevailing rate of interest imposed by MBf Finance Berhad for this type of unit. If the interest rate of your I loan is higher than the rate of MBf Finance Berhad, you will have to bear the difference of any excess.

Kindly signify your acceptance of our agreement to pay the interest and your consent to communication with your end financier.

This document is signed by the first appellant as the attorney for Kesturi Sakti Sdn Bhd. It shows as having been copied to "End Financier" who in the present instance, counsel for the appellants concedes, is the second appellant.

Later, on April 29 1997, the respondent took out an originating summons against the appellants, asking for a declaration that he need not make any payments to the second appellant until the issuance of the certificate of fitness for occupation. The learned Judge granted an order in terms of that application.

Before us, Mr Kelvin Kong for the appellant, submitted that the learned Judge erred by failing to take account of Clause 8 of the second appellant's letter of offer. He argued that on a proper construction of the terms of the said letter, which was issued by the second appellant and accepted by the respondent, the second appellant reserved the right to call upon the respondent to commence repayment of the loan without taking into account the issuance of the certificate of fitness for occupation.

With respect, we cannot accept this submission. The three documents; the sale and purchase agreement, the agreement with the first appellant and the loan agreement with the second appellant, must be read together as they form part of the same transaction. This is in accordance with settled principles of law.

Thus, in *Manks v. Whitely* [1912] 1 Ch 735, Fletcher Moulton LJ, said (at p 754):

> [W]here several deeds form part of one transaction and are contemporaneously executed they have the same effect for all purposes such as are relevant to this case as if they were one deed. Each is executed on the faith of all the others being executed also and is intended to speak only as part of the one transaction, and if one is seeking to make equities apply to the parties they must be equities arising out of the transaction as a whole. It is not open to third parties to treat each one of them as a deed representing a separate and independent transaction for the purpose of claiming rights which would only accrue to them if the transaction represented by the selected deed was operative separately. In other words, the principles of equity deal with the substance of things, which in such a case is the whole

A transaction, and not with unrealities such as the hypothetical operation of one of the deeds by itself without the others. (emphasis added.)

*When the three documents are read as a whole, their effect is this. In the first place, the respondent shall purchase the property from the developer* B *at a specified price and terms provided under the sale and purchase agreement. Thereafter, the first appellant shall keep the respondent indemnified and harmless in respect of any monetary payments due to the second appellant until the certificate of fitness of occupation is issued. Secondly, the second appellant will lend money to the respondent to pay* C *for the purchase upon the mutual covenants contained in its letter of offer subject to the condition that the interest will be paid by the first appellant during the relevant period.* (emphasis added)

**[20]** As can be seen, the facts in the above case bear striking resemblance to the present case. Arising out of that interlinking D and interlocking contractual relationship, it was also held that the second appellant being the lender could only call upon the borrower to commence repayment of the loan upon the issuance of a certificate of fitness. What His Lordship Gopal Sri Ram JCA (as he was then) sought to establish was the contractual links in E the relationship between the borrower, the developer and the financier in the context of a declaratory prayer that the financier as the second appellant can only require the borrower to commence the instalment payments only after a permanent certificate of fitness is obtained. See also the decision in *Cheong Bee* F *Yong v. MBf Finance Bhd & Anor* [2001] 1 CLJ 668.

**[21]** I would similarly hold that the plaintiff is not entitled contractually to claim interest from the defendant for the loan disbursed for the period before the CF is issued.

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**[22]** I am not unaware of a different conclusion reached in *AmBank (M) Bhd v. Goh Hock Eng & Anor* [2009] 1 LNS 1331 where His Lordship Harmindar Singh JC (as he then was) observed:

H [14] Upon a careful perusal of all the documents, I think there can be little doubt that interest had to be paid on the amounts disbursed even prior to the certificate of fitness of occupation. The question is who should pay the interest? From the documents, the developer had agreed to pay the interest until the certificate of I fitness. But what if the developer does not pay as is the case here? Can the plaintiff claim from the borrower? I think they can.

There are a number of reasons for this. There is no privity of contract between the plaintiff and the developer. If assuming the defendants did not pay the interest, the plaintiff could not sue the developer for it as there was no legal relationship between them. It was clear that the arrangement to pay the interest was by the developer on behalf of the defendants. This was because the developer had nothing to do with the loan. They were not the ones who had obtained the loan. It was the defendants who did. And the arrangement between the defendants and the developer could not bind the plaintiff. Although they had knowledge of the arrangement, there was nothing to bind them to the arrangement.

[15] The documents themselves bear out this state of affairs. The letters of offer and the loan agreement clearly set out the responsibility of the defendant to pay the interest. Clause 18(b) of the letter of offer in particular reiterates that even though the developer has agreed to pay the interest, the "obligation and commitments as per loan agreement to be executed between you and our attorney shall remain unchanged."

[16] For these reasons, I take the view that if the developer did not pay the interest, then the defendants were liable to pay the interest on the amount I disbursed.

**[23]** With respect I am not persuaded to follow the above interpretation which looks at the agreements in isolation from one another rather than in the interlinking and interlocking integration one with the other so that both the developer and financier are held to their respective bargains *vis-a-vis* the purchaser/borrower. It is trite law that consideration may proceed from a third party and in this case the developer where the liability to pay interest to the financier is concerned from the disbursement of the loan to the issuance of the CF. It would be foolhardy of the financier if it has not formalised this arrangement with the developer in the form of an enforceable contractual relationship. Both based on the essence and effect of the contractual relationships of the parties ie, the purchaser/borrower, the developer and the financier, where bearing of interest is concerned during the period up to the issuance of the CF and also based on the doctrine of *stare decisis* as *Balasubramaniam*'s case is a decision of the Court of Appeal, I have with respect declined to follow the reasoning in *Goh Hock Eng*'s case *(supra)*.

A **Whether The Plaintiff Is Estopped From Claiming Interest From The Defendant On The Loan For The Period Before The CF Is Issued**

**[24]** In the circumstances on the case where the plaintiff had in
B clear terms represented to the defendant that they will look to the developer to pay, the plaintiff cannot now renegade on that and indeed is estopped from claiming the interest not paid by the developer from the defendant. Both the demands of equity and good conscience would operate to prevent the plaintiff from so
C claiming against the defendant as purchaser/borrower. Indeed this principle of estoppel has received statutory stature in s. 115 of the Evidence Act 1950 as follows:

> When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing
D to be true and to act upon such belief, otherwise than but for that belief would have acted, neither he nor his representative in interest shall be allowed in any suit or proceeding between himself and that person or his representative in interest to deny the truth of that thing.

E **[25]** I had occasion to refer to the application of the principle of estoppel in *Citibank Bhd v. Pembangunan Cahaya Tulin Sdn Bhd (receivers and managers appointed) & Ors and other suits* [2012] 9 MLJ 181 at p. 217 as follows:

F > [127] In the case of *Public Textiles Berhad v. Lembaga Letrik Negara* [1976] 2 MLJ 58, Raja Azlan Shah FJ (as his Royal Highness then was) quoted Scrutton LJ in the Court of Appeal *(Greenwood v. Martin's Bank Ltd* [1932] 1 KB 371, at p 380), and stated the principle as follows:
>
G > > The classic exposition of the principle of estoppel is that given by Parke B in delivering the judgment of the court in *Freeman v. Cooke* (1848) 2 Ex 654 663. He cites the rule in *Pickard v. Sears* (1837) 6 A & E 469 474: That, where on, by his words or conduct, willfully causes another to
> H believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.

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[128] In the case of *Tenaga Nasional v. Teobros Development Sdn Bhd* [2008] 6 MLJ 391; [2008] 1 LNS 395, it was held as follows:

> Looking at estoppel on a wider perspective, it has always been perceived that estoppel involves the principles of justice and equity. It concerns the principle that a person who has led another to believe in a certain state of affairs from going back on the words or conduct when it is unjust or unconscionable for him to do so (per Lord Denning MR in *Moorgate Mercantile Co Ltd v. Twitchings* [1976] 1 QB 225 at p 241, [1975] 3 All ER 314 at p 323, (CA)). In modern times estoppel by representation is frequently applied and invoked. It arises when there is representation made either by statement or by conduct. It is said that conduct must necessarily include negligence (*Freeman v. Cooke* [1848] 2 Exch 654 at p 664) and silence (*Pacol Ltd And Others v. Trade Lines Ltd and R/l Sif IV ('The Henrik Sif')* Vol 1 Lloyd's Law Reports 456).

[129] Along the same vein, the Court of Appeal in the case of *Raju Jayaraman Kerpaya v. Chung Khiaw Bank Ltd* [1997] 2 MLJ 590 held:

> Now, of the doctrines invented by the Court of Chancery, estoppel is surely the most flexible. It is a rule by which a court does justice between parties to litigation according to the facts and substantial merits of the case. The only question at issue where estoppel is relied upon is whether it is just that the party sought to be estopped ought to succeed upon a particular issue or in the action generally, as the case may be (see *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331).

**[26]** If the plaintiff has problem collecting the interest from the developer for the period before the issuance of CF, then that is the risk that the plaintiff has to take under the contractual arrangements that it has entered into with the developer. For the plaintiff as financier to now say that it has recourse in any event to claim from the defendant as borrower would require clear and unequivocal clauses to that effect. It is for the plaintiff to manage that risk and it is in a better position to do so compared to the defendant who as a purchaser is entitled to enjoy the benefits of the representation made to him by the developer and supported and sanctioned by the plaintiff as financier.

**[27]** I have no doubt that based on the letter of offer and the interpretation of the relevant clauses *vis-a-vis* the loan agreement and based on the principle of estoppel, the plaintiff here as lender cannot claim and exact payment of interest on the loan disbursed for the period before the issuance of the CF.

*Whether The Order Of The Shah Alam High Court Prohibits The Plaintiff Even After CF Is Issued From Claiming Interest Against The Defendant For The Period Before The CF Is Issued*

**[28]** The words of the order of the Shah Alam High Court obtained before His Lordship Low Hop Bing J (later JCA) are clear and unambiguous. It reads:

> 1. That the Plaintiffs **shall not be required to make any payments in relation to the loan** from the 1st Defendant for so long as the buildings purchased have not had a Certificate of Fitness of Occupation issued; (emphasis added)

**[29]** Conversely the plaintiff here as the lender would not be able to impose and claim from the defendant as borrower any payments which would include interest until the CF is issued. If there was ambiguity, the plaintiff here who was the 1st defendant there should have asked for clarification of the order but it did not. If the 1st defendant was dissatisfied with the judgment or order of the Shah Alam High Court, it should have appealed but it did not. Assuming that there was an ambiguity as to whether the claim for interest was just suspended until the CF had been issued, such an ambiguity should be resolved in favour of the weaker party who has little negotiating power ie, the defendant here as purchaser/borrower. Nothing is stated in the Shah Alam High Court order that the rights of the plaintiff to claim interest for the period before the CF was issued was only held in abeyance and postponed to a later date ie after CF was issued.

**[30]** The prohibition against the plaintiff here suing for interest is further underscored by para. 2 of the terms recorded by the High Court in Shah Alam in that:

> 2. The 1st Defendant whether by itself, its agents or servants or howsoever, be restrained from making a claim or bringing any action against any or all of the Plaintiffs **to recover the loan including enforcing any of its rights under the Loan Agreements** against any or all of the Plaintiffs for the purchase of the factory units in the designated titles until the Certificate of Fitness of Occupation is obtained. (emphasis added)

**[31]** For the reasons given above, I have no hesitation in holding that in answer to questions 1 and 2 posed above:

1. The plaintiff cannot impose and claim interest on the said loan from the date the loan was disbursed on 27 February 1995 till 7 July 1999 (the date of the order of the Shah Alam High Court);

2. The plaintiff cannot impose and claim interest from 8 July 1999 till 10 December 2010, ie, the date the Certificate of Fitness (CF) was issued.

**Whether The Plaintiff Can Impose And Charge Interest From 11 December 2010 Till Date Of Settlement**

**[32]** There is no doubt that once the CF has been issued and there is agreement that it was issued on 10 December 2010, then the normal obligations of the defendant as borrower under the Loan Agreement would apply with full force. That would include the obligation to pay the loan and the interest on the full loan disbursed but not the interest on the loan disbursed for the period before the CF was issued.

*Whether The Plaintiff Was Under A Duty, Contractual Or Otherwise, To Inform The Defendant Of The Issuance Of The CF To The Property*

**[33]** Under the sale and purchase agreement, the developer has to inform the defendant about the issuance of the CF following the delivery of vacant possession to the property. This is provided for under cl. 16 on delivery of vacant possession, cl. 17 on manner of delivery of vacant possession and cl. 18 on certificate of fitness.

**[34]** As part of the security documentation for the loan extended by the plaintiff as financier to the defendant as borrower, the defendant had assigned absolutely to the plaintiff all the rights, title and interests in the said property in the sale and purchase agreement through the deed of assignment dated 10 February 1995 entered into between the defendant and the plaintiff. The legal effect of such an assignment is governed by s. 4(3) of the Civil Law Act 1956 and was also clarified in a number of decisions by the apex court. The cases suggest that by the use of the words "absolutely", the parties had intended that the assignee

should have all the rights, title and interest of the assignor in the sale and purchase agreement (*Phileoallied Bank (Malaysia) Bhd v. Bupinder Singh Avatar Singh & Anor* [2002] 2 CLJ 621; *Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd* [1985] 1 CLJ 56; [1985] CLJ (Rep) 231 and *Hipparion (M) Sdn Bhd v. Chung Khiaw Bank Ltd* [1989] 2 CLJ 101; [1989] 1 CLJ (Rep) 41).

**[35]** Both parties are not disputing that the CF was issued only on 10 December 2010; see p. 132 of CBD. The plaintiff said that it had to do its own search with the local authority and when it had realised that the CF had been issued it wrote to the defendant by letter dated 15 July 2011 and 7 September 2011 at pp. 136-138 of CBD to claim for the interest and amount outstanding. It is not quite right for the defendant to say that it only knew of the fact of the CF having being issued on 10 December 2010 when in the plaintiff's reply to the defence filed, the plaintiff made a specific averment to it. The reply was served on the defendant's solicitors on 12 January 2012. As the order of the Shah Alam High Court had restrained the plaintiff from demanding for payment of amount due under the loan until the CF is issued, the defendant must have known that upon the plaintiff's demand being made by letter dated 15 July 2011 that the CF must have been issued already.

**[36]** Here is a case where there is no evidence of the developer having informed either the purchaser or the financier (as absolute assignee) the fact of the issuance of the CF on 10 December 2010. I noted the strong argument by His Lordship Abdul Aziz Mohamad J (now JCA) in *Sakinas Sdn Bhd v. Siew Yik Hau & Anor* [2002] 3 CLJ 275 that the so-called absolute assignment is more in the nature of a charge or security only, for, had a separate title been issued, the financier would have taken a charge over the Property under the National Land Code. His Lordship went on to hold that the purchaser could sue the developer for damages for late delivery even though the rights under the sale and purchase agreement had been absolutely assigned to the financier. His Lordship also referred to the following cases in support of his proposition: *Max-Benefit Sdn Bhd v. Phuah Thean An & Anor* [2001] 2 CLJ 70, *Pak Ki Yau & Anor v. Kumpulan Promista Sdn Bhd* [1999] 4 CLJ 205, *Loh Hoon Loi & Ors v. Viewpoint Properties (Sabah) Sdn Bhd* [1995] 1 LNS 286 and *Tan Yang Long & Anor v. Newacres Sdn Bhd* [1992] 1 CLJ 211; [1992] 3 CLJ (Rep) 666.

**[37]** Could the defendant as purchaser here sue the developer for damages for late delivery of possession or for losses suffered as a result of having to pay interest without realising that CF has been issued? If there is anyone having the right to sue the developer based on how the relevant clauses in the sale and purchase agreement are worded, it must surely be the defendant as purchaser. If the purchaser cannot effectively sue MBf Property Services Sdn Bhd because it has been wound up, then that is a risk that the purchaser must take when it chose to purchase from the developer.

**[38]** The plaintiff in the statement of claim had claimed interest only from 1 September 2011 and not from 11 December 2010. Bearing in mind where the respective rights and risks fall where both the purchaser and financier were unaware when the CF was issued on 10 December 2010 until much later, I think it would be fair in all the circumstances of this case for interest to begin running from 1 September 2011.

## Pronouncement

**[39]** As I had earlier given summary judgment by consent for RM524,623.14 and the balance to go for trial, I proceeded to make an order on interest on the said sum as per the rate stated in the Loan Agreement ie, interest at 3.4% above BLR (which is at 6.60%) per annum on a monthly rest plus 1% per annum for default interest on RM524,623.14 from 1 September 2011 till date of realisation.

**[40]** Learned counsel for the plaintiff informed the court that the plaintiff was not pursuing costs on a solicitor-client basis and so the court awarded costs of RM3,000 to the plaintiff.